IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
March 21, 2007 Session

IN RE P.J.G.

Appeal from the Juvenile Court for Hamblen County
Nos. 12968 & 12969 Mindy N. Seals, Judge

No. E2006-02003-COA-R3-PT - FILED APRIL 27, 2007

The trial court terminated the parental rights of T.G. ("Father") to his daughter, P.J.G., who was 9 years old at the time of trial. The court found, by clear and convincing evidence, that grounds for terminating Father's parental rights existed and that termination is in the best interest of the child. Father appeals, challenging these determinations as well as various evidentiary rulings made by the trial court. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Edward L. Kershaw, Greeneville, Tennessee, for the appellant, T.G.

Robert E. Cooper, Jr., Attorney General and Reporter, and Elizabeth C. Driver, Assistant Attorney General, Nashville, Tennessee, for the appellee, State of Tennessee Department of Children's Services.

OPINION

I.

Father was married to G.G. and four children were living in their household. G.G. was the mother of all four children. The two oldest children, J.H. (DOB: 3-12-90) and V.H. (DOB: 3-22-85), were Father's stepdaughters. The two youngest children were Father's biological children, his son, A.G. (DOB: 1-18-94) and his daughter, P.J.G. (DOB: 11-18-96).

In March of 2003, all four children were declared dependent and neglected and removed from the care of their mother. The children were declared dependent and neglected after Father pleaded

guilty to sexually abusing his stepdaughter, J.H. The children were placed in the temporary custody of the State of Tennessee Department of Children's Services ("DCS").

In March 2004, DCS filed a petition to terminate Father's parental rights as to A.G. and P.J.G.[1] As grounds for terminating Father's parental rights, DCS alleged, among other things:

> The children have been removed by order of this Court for a period of six (6) months; the conditions which led to their removal still persist or other conditions persist which in all probability would cause the children to be subjected to further abuse and neglect and which, therefore, prevent the children's return to the care of [Father]; there is little likelihood that these conditions will be remedied at an early date so that these children can be returned to [Father] in the near future; the continuation of the legal parent and child relationship greatly diminishes the children's chances of early integration into a stable and permanent home. . . .
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> [Father] has been found to have committed severe child abuse against [J.H.], the half-sibling of [A.G. and P.J.G.]. . .
>
> [Father] has been sentenced to more tha[n] two (2) years imprisonment for conduct which has been found or is found to be severe child abuse. . . .
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> Prior to his current incarceration, [Father] engaged in conduct which exhibits a wanton disregard for the welfare of the children.[2] . . .

DCS further alleged that it was in the two children's best interest for Father's parental rights to be terminated.

A trial took place in June 2006. Father was the first witness.[3] Father testified that he currently lives in a three bedroom mobile home located in Hamblen County. Father purchased the

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[1] DCS later nonsuited its petition as to A.G. The nonsuiting of the petition is not at issue on this appeal except to the extent that Father claims it was not in P.J.G.'s best interest to terminate his parental rights when his parental rights to A.G. were not terminated, an issue discussed later in this opinion.

[2] DCS also alleged as a ground for terminating Father's parental rights that Father had been confined in a correctional facility by order of the court as a result of a criminal act, that Father was serving a sentence of ten or more years, and that P.J.G. was under the age of eight at the time the sentence was imposed. *See* T.C.A. § 36-1-113(g)(6) (Supp. 2006). Because Father had not been sentenced to such a lengthy sentence, DCS properly abandoned this ground as a basis for terminating Father's parental rights.

[3] By agreement of the parties, certain witnesses testified out of order in order to accommodate the schedules of some of the witnesses.

mobile home so that his children would have a place to live in the event he regained custody. Father lives with his new wife as well as his mother and stepfather. Father and his wife own a company and they cut trees for a living.

Father denied sexually abusing J.H. Father claimed the reason he pleaded guilty to the crime of sexual battery by an authority figure was because J.H. was disabled and he did not want to put her through the ordeal of a trial. There was a two paragraph "confession" taken by the police department and those two paragraphs were written by the police officer who had interviewed Father. Father acknowledged signing the confession.

Father testified that he participated in sex offender programs while in prison and that he had taken other classes since being released from prison. Father claimed that he received documentation showing that he completed the classes, but at trial he did not know the location of that documentation. Father stated on direct examination that he started taking parenting classes at Carson Newman College about a month or two before trial. When informed on cross-examination that if he was not going to parenting classes as he had just testified, that he could be charged with perjury, Father then admitted that he had stopped attending classes at Carson Newman because he had been "falsely arrested" for being a sexual offender and living too close to a school.

The next witness was Doug Masengill, a case manager for DCS. For three years Masengill has been the case manager assigned to the case pertaining to P.J.G., who will hereinafter be referred to as "the child." Masengill developed a permanency plan in November 2004 which was signed by Father. The plan required Father to (1) participate in a psychosexual assessment, (2) take parenting classes, and (3) follow any recommendations. Masengill instructed Father to provide him with documentation showing that he completed the required assessments and classes, but Father never provided such documentation even though Masengill requested it on more than one occasion. Masengill testified that Father had not provided him with any documentation which, in effect, would suggest that it would be safe for the child to be returned to Father's care. Masengill received a copy of the psychosexual assessment report prepared by Amy Mize, a clinical therapist with Counseling and Consultation Services. Masengill instructed Father to provide documentation when he completed Mize's recommendations. Once again, Father never provided any such documentation. The plan also required Father to complete an assessment at Cherokee Mental Health; Father did complete that assessment. It was also recommended that Father complete outpatient treatment, which he has not done. Masengill is not aware of Father ever completing any sexual offender treatment.

Masengill testified that the child is in foster care and has been with the same foster parents for over three years. Masengill further stated that the child has scoliosis, cerebral palsy, and asthma. According to Masengill, the child has developed a very loving relationship with her foster parents and the foster parents have indicated that they would like to adopt her.

Jewell McLain is a team leader with DCS. McLain testified that she has had at least three meetings with Father to discuss the permanency plan and to discuss the progress he needed to

demonstrate toward completing that plan. After Father was released from prison, McLain instructed Father to send her documentation showing that he had completed a mental health plan. McLain never received this documentation from Father. McLain likewise has not received any documentation showing Father completed the outpatient treatment that was recommended. McLain added that because Father has not completed these requirements, he posed a risk to the child.

J.E. is the child's foster mother. J.E. has been a foster mother for over 23 years and has taken numerous parenting and foster care classes along the way. J.E. has worked for 27 years as a special education assistant and receives training that assists her with caring for special needs children. J.E. testified to the child's physical and mental disabilities and the amount of care the child needs in order to address those disabilities. J.E. stated that the child is very affectionate and loves to play outside. Unfortunately, the child says very little and J.E. described her as being non-verbal. Due to the child's asthma, J.E. and her husband apply breathing treatments as many as four times a day if the child is having a reaction. The child also has scoliosis and osteoporosis and must wear a back brace at all times except when she is sleeping. J.E. stated that the child is not able to do anything for herself and must wear a diaper. According to J.E., when the child is not at school, she is by J.E.'s side at all times, and J.E. loves it that way. J.E. wishes to adopt the child.

DCS tendered the deposition of Mize as an expert witness and sought to have the deposition admitted for proof. As mentioned previously, Mize is a clinical therapist and she earned a Master's Degree in Clinical Psychology from East Tennessee State University. Mize works for Counseling and Consultation Services, which is a specialized sex offender treatment program that provides assessments as well as treatment. Mize conducted an assessment on Father. Mize described the assessment as follows:

> When we conduct a risk assessment on someone who has been charged with or has been – has sexually acted out in some way, we're looking at two things; we're looking at risk to engage in that behavior again in the future, as well as if they need treatment, and, if so, what kind of treatment and if they're amenable to treatment. . . .
>
> We use, of course, client self-report, collateral information that is provided to us by the Court, DCS, whoever provides that collateral information, any other outside sources, such as family interviews, if those are available, which was not in this case, actually, physiological measurements such as polygraph, plethysmograph assessments, Court records, and all those kinds of things.… We look at everything collectively. I wouldn't take a polygraph and just look at it alone or take the plethysmograph assessment and look at it alone or just the self-report. We have to put all those things together.

Mize further stated that when conducting an assessment on Father, family contacts were not made available to her and Father was unable to complete some specialized inventories because of

his limited ability to read and write. Mize noted that Father took a polygraph examination when a prior assessment was conducted and the results from that polygraph examination were made available to her. The polygraph examiner asked Father whether he had engaged in a sexual act with his stepdaughter J.H. Father denied engaging in any sexual act with his step-daughter and the polygraph results indicated that he was being deceptive. Mize went on to explain that even though polygraph examinations are utilized, the risk assessment is not designed or intended to prove innocence or guilt. According to Mize,

> [polygraph examinations] are standard practice protocol through the Tennessee Sex Offender Treatment Board, as well . . . as the Association for Treatment of Sexual Abusers and the Center for Sex Offender Management when it comes to conducting risk assessments.… [T]hat's why they are used in a risk assessment.… [O]ur role is not to prove his guilt or innocence.…

Mize was questioned in detail about the various aspects of her report, with the report oftentimes being quoted. In her report, Mize stated that Father repeatedly denied any sexual contact with his stepdaughter, other than perhaps "accidentally" touching her breasts when hugging her from behind. Father denied to Mize that he received any sex offender treatment while in prison. Mize's report concludes with the following recommendations:

> [Father] has recently completed a Risk Assessment designed to address present risk to re-offend and treatment recommendations. Recommendations generated from this assessment are made to provide his probation officer about his risk and treatment prognosis in order to assist in disposition. Based on the information available, the following recommendations are made:
>
> 1. [Father] presents a Moderate risk to sexually act out. Without appropriate supervision, boundaries that limit his access to potential victims, and specific sex offender treatment to address his sexual offending, he will most likely continue to sexually act out.
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> 2. [Father] is considered a poor treatment candidate. He is not likely to benefit from an Outpatient Sex Offender Treatment due to his complete denial. Offenders who are not honest with their offending history experience a significantly increased duration in treatment due to the lack of movement or progress brought about by their self-imposed impediments. Therefore, it is recommended at this time that [Father] be placed in a secure, intensive treatment program that can address his level of denial and provide safety for the community. Should it be requested for [Father] to attend out-patient treatment, he would need to have **strict supervision** in the community and be

> required to openly discuss his sexual offending, as evidenced by his passing a Full Disclosure Polygraph Examination, within 90 days of entering treatment. If he is unwilling to fully disclose at the end of this time period, it is recommended that his case be reviewed to determine if he is too much of a risk to remain in the community.
>
> 3. [Father] should have *no contact with minor children*, including his own children, until he fully discloses all minors with whom he has knowingly had sexual contact, receives and reaches a point in his Sex Offender Treatment that he will be able to meet sexual offender reunification guidelines, understands his risk to re-offend, *and* both the treatment provider and other authoritative entities approve supervised contact.

(Bold print, underling and italics in original).

Following the trial, the trial court filed its findings of fact and conclusions of law, which provide, in pertinent part, as follows:

> Father alleges that the clinical therapist who administered the psychosexual evaluation is not an expert, that the psychosexual evaluation must be excluded because Ms. Mize relied heavily on a polygraph examination and because a psychosexual evaluation has not been recognized as reliable scientific evidence.
>
> Psychosexual evaluations have been recognized by the courts as reliable scientific evidence. State of TN v. Gregory Pierce, 138 S.W.3d 820 (Tenn. 2004) cites the testimony and report of Dr. Adler, the clinical director of Counseling and Clinical Services. He administered a risk assessment on the defendant and the clinical therapist who administered the risk assessment on father in the present matter is employed by CCS. Psychosexual evaluations or risk assessments have been determined to be useful tools in the treatment and evaluation of sex offenders. See T.C.A. 39-13-704(2) which established the "sex offender treatment board."
>
> Another objection by father is that the polygraph results referenced by Ms. Mize in her deposition for proof are inadmissible. The Tennessee appellate courts have found that in criminal proceedings against defendants, polygraph results are not admissible. The results here are sought to be introduced as one facet of the recommended treatment for sexual perpetrators. They are not sought to be introduced to prove the guilt or innocence of father. If the appropriate

> foundation had been laid, the results of father's polygraph examination would be admissible; however, a Jim Morris administered the polygraph and no foundation was laid through Ms. Mize which would permit introduction of the results. Therefore, the court has not considered the results of the polygraph.

The trial court then reviewed the procedural history of the case, noting that the child was removed from the custody of her parents by order of the court after being found to be dependent and neglected due to Father's sexual abuse of his stepdaughter. At the time the child was found to be dependent and neglected, Father had pleaded guilty to sexually abusing his stepdaughter and was in prison serving a three-year sentence. The trial court then stated:

> ABANDONMENT AND REASONABLE EFFORTS
>
> As one ground for termination, the state alleges . . . that "prior to his incarceration, [Father] engaged in conduct which exhibits a wanton disregard for the welfare of the . . . children." The state must be alleging TCA 36-1-102(1)(A)(ii). This statute requires DCS to utilize reasonable efforts prior to the removal of the child unless an emergency exists and to further use reasonable efforts "for a period of four months following the removal . . . ."
>
> The circumstances of [J.H.] being sexually abused did prevent reasonable efforts from being utilized prior to [the child's] removal. Also, the court finds by clear and convincing evidence that DCS utilized reasonable efforts to assist father in establishing a suitable home for [the child]. Specifically, Darlene McLain, DCS team leader, testified she had three meetings with father during December, 2005, January, 2006 and February, 2006. She discussed Ms. Mize's recommendations with father and where he could obtain counseling and instructed him to contact Ms. Mize as to where he could obtain sexual offender treatment. Doug Masengill has been father's case manager for three years. He noted that father was released from prison sometime during 2004 and that father executed the permanency plan on December 14, 2004 yet has not completed the parenting classes nor completed the recommendations of Ms. Mize in the psychosexual evaluation to enable [the child] to be returned safely to him. Also, he agreed in the plan to begin counseling within thirty days of his release from prison and he has provided no documentation of this. He believes that father has had ample time, almost two years, to complete the parenting classes and to show documentation of his counseling sessions.

The court finds that father's failure to complete the parenting classes, attend counseling sessions and follow the recommendations of the assessment administered by Ms. Mize show a lack of concern for [the child] to such a degree that it appears unlikely father will provide a home for [the child] at an early date. Father's denial of any sexual abuse of [J.H.] is a major stumbling block in his being successful in counseling or sexual offender treatment, and this adamant denial even after pleading guilty and serving a prison sentence show a lack of concern for [the child]. Even if the appellate court determines that the testimony and report of Ms. Mize should have not been introduced and considered by the court, the fact that father pled guilty to a felony and now adamantly denies his guilt is sufficient in and of itself to show the threat of harm [the child] would be subjected to if father's parental rights are not terminated.

* * *

PERSISTENCE OF CONDITIONS

TCA 36-1-113(g)(3)(A) sets forth the criteria for this ground for termination. The child has been removed by court order for a period of six months. The court further finds that the condition which led to the child's removal, the sexual abuse of [J.H.], still exists and [the child] would in all reasonable probability be subjected to abuse if returned to father and there is little likelihood that this condition will be remedied at an early date so that [the child] could be returned to father. The court finds this by clear and convincing evidence based upon these facts: father pled guilty to sexual battery by an authority figure of [J.H.] and received a three year prison sentence. He gave a statement to a detective with the Morristown Police Department wherein he stated:

> On Jan. 10, 2002 I had [J.H.] come into my bedroom. I had her perform a blowjob on me. . . . I didn't do the other things she said I've done. I only had her do this one time. I only had her do this blowjob because I love her and her mother doesn't do it for me. . . .

Father signed the statement in two places. . . .

At the present hearing, father testified he did not sexually abuse [J.H.], that he did not give the above statement to the detective, and

> that the only reason he pled guilty was so [J.H.] would not have to testify against him in a criminal trial.
>
> Even though he maintains he committed no sexual abuse of [J.H.], he testified he took classes for sexual offenders at Brushy Mountain Prison for almost one and one-half years. He presented no documentation for this.
>
> * * *
>
> The court has observed father and listened to his testimony intently. Father is not credible. The court believes he did sexually abuse [J.H.]. . . . Another example of his dishonesty under oath is that he emphatically testified he is attending parenting classes at Carson-Newman College. Then, when confronted . . . that he might be guilty of perjury if this was not accurate, he recanted and stated that he had stopped going to the parenting classes. He acknowledged that the need for parenting classes had been explained to him by DCS and that he had been out of prison since 2004.
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> One of father's reasons for sexually abusing [J.H.] was because he loved her. . . . The court is very concerned that father's thinking is so askew that he thinks requiring an eleven or twelve year old child to perform oral sex on him is an appropriate way to express love for a child. He poses a great threat to [the child] due to this abnormal way of expressing love for a child. . . . [Due to the child's physical and mental disabilities, the child] would not be able to tell anyone if father abused her. Since he now denies the sexual abuse of [J.H., the child] would be under a continuing threat of harm if with father.
>
> The final factor is "the continuation of the parent . . . and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home." DCS has proven this factor by clear and convincing evidence: the child has been in [the current] foster home since May, 2002, the [biological] mother's parental rights have been terminated . . . and the [foster parents] want to adopt [the child].

Finally, the trial court discussed the various factors to be considered when determining whether terminating Father's parental rights was in the child's best interest. After discussing the relevant factors, the trial court concluded that there was clear and convincing evidence that termination of Father's parental rights is in the child's best interest.

II.

In ***Dep't. of Children's Servs. v. P.M.T.***, No. E2006-00057-COA-R3-PT, 2006 WL 2644373 (Tenn. Ct. App. E.S., filed September 15, 2006), *no appl. perm. appeal filed*, this Court stated:

> The law is well established that "parents have a fundamental right to the care, custody, and control of their children." ***In re Drinnon***, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing ***Stanley v. Illinois***, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)). This right, however, is not absolute and may be terminated if there is clear and convincing evidence justifying termination under the pertinent statute. ***Santosky v. Kramer***, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Clear and convincing evidence is evidence that "eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence." ***O'Daniel v. Messier***, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995).

P.M.T., 2006 WL 2644373, at *4.

III.

Our Supreme Court recently reiterated the standard of review for cases involving termination of parental rights. According to the Supreme Court:

> This Court must review findings of fact made by the trial court *de novo* upon the record "accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). To terminate parental rights, a trial court must determine by clear and convincing evidence not only the existence of at least one of the statutory grounds for termination but also that termination is in the child's best interest. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (citing Tenn. Code Ann. § 36-1-113(c)). Upon reviewing a termination of parental rights, this Court's duty, then, is to determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.

In re F.R.R., III, 193 S.W.3d 528, 530 (Tenn. 2006).

IV.

The trial court terminated Father's parental rights pursuant T.C.A. §§ 36-1-113(g)(1) and (g)(3) (Supp. 2006), which provide as follows:

> (g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:
>
> (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;
>
> * * *
>
> (3) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:
>
> (A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;
>
> (B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and
>
> (C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home . . . .

As relevant to this appeal, T.C.A. § 36-1-102(1)(A)(ii) (2005) defines "abandonment" as follows:

> (1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, "abandonment" means that:
>
> * * *
>
> (ii) The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department or a licensed child-placing agency, that the juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts

> from being made prior to the child's removal; and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date . . . .

V.

Father appeals claiming: (1) the trial court erred when it allow DCS to supplement Mize's deposition testimony with a copy of Mize's report when Mize was not present at trial to authenticate the report; (2) the trial court erred in allowing Mize' report and deposition to be admitted at trial; (3) the trial court erred in finding that there was clear and convincing evidence to terminate Father's parental rights under any of the statutory grounds at issue; and (4) the trial court erred when it determined that there was clear and convincing evidence that termination of Father's parental rights is in the child's best interest.

VI.

We first will discuss Father's various evidentiary issues. In so doing, we keep the following in mind:

> [Q]uestions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993). The trial court's ruling in this regard may only be overturned if the discretion is arbitrarily exercised or abused. *Id*.

McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 263-64 (Tenn. 1997).

During Mize's deposition, her report inadvertently was not made an exhibit to that deposition. When DCS sought to have the report admitted at trial as an exhibit to the deposition, Father objected. In resolving the objection, the trial court compared many of the quotations referenced in the deposition to the report itself. In so doing, the trial court determined that the report DCS was seeking to have admitted as an exhibit to the deposition was, in fact, the report being quoted at length in the deposition. The trial court then stated:

> Based upon the deposition for proof that the Court has just gone over . . . the Court feels that it was used as the basis for some of the testimony at the deposition for proof. Therefore, [Father's] objection is overruled. . . .

Tenn. R. Evid. 901(a) states that the requirement of authentication as a condition precedent to admissibility "is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims." When making its ruling, the trial court painstakingly compared Mize's deposition testimony which quoted various portions of her report to the report tendered by DCS at trial. They matched perfectly. Thus, the trial court was satisfied that the report was exactly what DCS claimed it was. We conclude that the trial court did not abuse its discretion when it allowed the report to be admitted as an exhibit to Mize's deposition. It is also important to mention that the contents of the report comprise the vast majority of Mize's 83-page deposition testimony. The important aspects of the report relied upon by the trial court were all thoroughly discussed in the deposition. Father points us to nothing from the report that was relied upon by the trial court that was not also discussed in detail during the deposition. Thus, even if the trial court erred in allowing the report to be admitted at trial, the trial court, nevertheless, had deposition testimony providing the same exact proof. Any error would, therefore, be harmless.

Father's next evidentiary issue is his claim that Mize's deposition as a whole should have been excluded. Father correctly points out that Mize testified that when performing assessments, the person performing the assessment typically relies on various components including interviews of family members and specialized inventories. However, Mize was not granted access to Father's family members, and specialized inventories could not be undertaken because Father could not read and write. Because these two components were missing, Father claims the entire assessment was inadmissible. We disagree. Mize testified that there are many components that are utilized when making an assessment, such as a client's self-report, collateral information provided by the Court and DCS, physiological measurements such as polygraph and plethysmograph assessments, Court records, "and all those kinds of things.… [are looked at] collectively." We do not believe the overall reliability of the assessment is undermined simply because Father's family members were not made available to Mize and because Father was not able to read and write. Again, the precise issue is whether the trial court abused its discretion when it allowed Mize's deposition to be admitted, and we are unable to conclude that such abuse occurred.

Father's final evidentiary issue is his claim that the report should have been excluded because it relied, in part, on a polygraph examination that was inadmissible. Father relies on ***State v. Pierce***, 138 S.W.3d 820 (Tenn. 2004), a case in which the Supreme Court determined that the trial court erred in relying on the results of the defendant's sex offender polygraph examination when denying the defendant's request for parole. In reaching this conclusion, the Supreme Court specifically noted that the "propriety of using polygraph tests in treatment and monitoring programs for sex offenders was not at issue in [that] case." ***Id***. at 825 n.7. The Court also referenced T.C.A. § 39-13-704(d)(2) which discusses the use of polygraph examinations when monitoring and treating "sex offenders who have been 'placed on probation, incarcerated with the department of correction, placed on parole, or placed in community corrections.'" ***Id***. (quoting T.C.A. § 39-13-704(d)(2)). We note, in resolving this issue, that the polygraph results are not being used in a criminal context to establish Father's guilt or innocence or to establish whether he is entitled to parole. *See* ***In re A.J.H.,*** No. M2005-00174-COA-R3-PT, 2005 WL 3190324, at *10 (Tenn. Ct. App. M.S., filed November 28, 2005), *no appl. perm. appeal filed* (discussing the impact of the father's prior refusal to take a

polygraph examination and noting that "[t]here is no statutory prohibition in the use of polygraph tests as a part of a psychosexual evaluation in this non-criminal context.").

The results of the polygraph examination were utilized by Mize for one limited purpose, *i.e.*, to emphasize that Father was not being truthful when he denied sexually abusing J.H. Even if the results of the polygraph examination are discarded altogether, there was still an abundance of proof that Father's current denial that he sexually abused J.H. simply was not true, not the least of which is Father's guilty plea and subsequent sentence to three years in prison. In addition, there is the trial court's credibility determination that Father's claim that he did not sexually abuse J.H. and his post-conviction recanting of his confession are not worthy of belief. In ***Wells v. Tennessee Bd. of Regents***, the Supreme Court discussed witness credibility:

> Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

Wells, 9 S.W.3d 779, 783 (Tenn. 1999).

In ***Lockmiller v. Lockmiller***, No. E2002-02586-COA-R3-CV, 2003 WL 23094418 (Tenn. Ct. App. E.S., filed December 30, 2003), *no appl. perm. appeal filed*, this Court stated as follows:

> The credibility of witnesses is a matter that is peculiarly within the province of the trial court. *See* ***Bowman v. Bowman***, 836 S.W.2d 563, 567 (Tenn. Ct. App. 1991). That court has a distinct advantage over us: it sees the witnesses *in person*. Unlike an appellate court - which is limited to a "cold" transcript of the evidence and exhibits - the trial court is in a position to observe the demeanor of the witnesses as they testify. This enables the trial court to make assessments regarding a witness's memory, accuracy, and, most importantly, a witness's truthfulness. The cases are legion that hold a trial court's determinations regarding witness credibility are entitled to great weight on appeal. *See, e.g.,* ***Massengale v. Massengale***, 915

> S.W.2d 818, 819 (Tenn. Ct. App. 1995). In the absence of unrefuted authentic documentary evidence reflecting otherwise, we are loathe to substitute our judgment for the trial court's findings with respect to the credibility of the witnesses.

Lockmiller, 2003 WL 23094418, at *4 (emphasis in original).

Even if the polygraph examination should not have been considered by Mize, there was overwhelming proof of the falsity of Father's denial that he committed sexual abuse and clear evidence that his denial severely impacts his ability to parent the child. Therefore, Mize's reliance on the polygraph examination ultimately had little or no impact on her overall assessment and does not render the assessment invalid. Because there was overwhelming proof, separate and apart from the polygraph results, that Father was being dishonest when he denied the sexual abuse, we need not decide whether Mize improperly relied on those test results because the remaining evidence establishes clearly and convincingly that Father committed the sexual abuse and was being dishonest at trial. In any event, the issue of whether Mize properly relied on Father's polygraph examination was rendered moot when the trial court determined that a proper foundation had not been laid and the results of that examination would not be considered by the court.

With regard to the various evidentiary issues raised by Father, we conclude that the trial court did not abuse its discretion. The trial court's evidentiary rulings are hereby affirmed.

VII.

Father's next issues surround whether DCS clearly and convincingly proved statutory grounds to terminate Father's parental rights. The trial court first determined that Father had abandoned the child as that term is defined in T.C.A. § 36-1-102(1)(A)(ii) (2005). The evidence establishes, clearly and convincingly, that the child was removed from the home after being found

to be dependent and neglected.[4] The child was thereafter placed in the custody of DCS and, following Father's release from prison, DCS made reasonable efforts to assist Father in establishing a suitable home for the child. However, a suitable home could not be established because Father would not do what was necessary and required of him to ensure the child's safe return to his care. Among other things, Father did not complete parenting classes, counseling, or outpatient treatment. Father demonstrated a lack of concern for the child to such a degree that it appeared unlikely that he would be able to provide a suitable home for the child at an early date. We affirm the judgment of the trial court that the evidence establishes by clear and convincing evidence that Father abandoned the child as that term is defined in T.C.A. § 36-1-102(1)(A)(ii).

The second ground upon which the trial court terminated Father's parental rights is found at T.C.A. § 36-1-113(g)(3) (Supp. 2006). The child had been removed from Father's care by order of the court for more than 6 months. The conditions which led to the child's removal "or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect" still remain. T.C.A. § 36-1-113(g)(3)(B). Father has not demonstrated that he is in a position to care for the child. There simply is little or no likelihood that Father will remedy this situation in the near future. Maintaining the parent-child relationship will greatly diminish the child's chances of early integration into a safe, stable and *permanent* home given that such a home is available to her right now. Given the child's physical and mental disabilities, she is quite fortunate to have been placed with the current foster parents and even more fortunate that they desire to adopt her. In short, the preponderance of the evidence does not weigh against the trial court's finding that there was clear and convincing evidence to terminate Father's parental rights pursuant to T.C.A. § 36-1-113(g)(3).

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[4] T.C.A. § 37-1-102(12) (2005) defines a "dependent and neglected child" as including a child:

* * *

> (B) Whose parent, guardian or person with whom the child lives, by reason of cruelty, mental incapacity, immorality or depravity is unfit to properly care for such child;
>
> * * *
>
> (F) Who is in such condition of want or suffering or is under such improper guardianship or control as to injure or endanger the morals or health of such child or others; [or]
>
> (G) Who is suffering from abuse or neglect . . . .

VIII.

The final determination made by the trial court was that there was clear and convincing evidence that it is in the child's best interest for Father's parental rights to be terminated. Father's challenge to the trial court's best interest finding is very brief. Father claims:

> [I]t does not make sense that his rights to one child would be terminated but not the other.… How is it in the best interest of one child for him to remain the father but not the other? This does not make sense.

The short answer to the question posed by Father is that the trial court determined only that it was in his daughter's best interest for Father's parental rights to be terminated. Because the petition to terminate Father's parental rights to his son was nonsuited, there has been no finding, at least not yet, as to what is in his son's best interest. This Court has no way of knowing what the future holds with respect to Father's parental rights to his son. There is no inherent conflict created by the trial court's ruling in this case.

The factors a trial court must consider when deciding whether the termination of parental rights is in the best interest of a child are set forth in T.C.A. § 36-1-113(i) (Supp. 2006). These factors are:

> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
>
> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
>
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
>
> (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
>
> (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional

> or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
>
> (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
>
> (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
>
> (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

The above list is not exhaustive and there is no requirement that every factor must be present before a court can find that termination of parental rights is in a child's best interest. *See* ***Dep't. of Children's Servs. v. P.M.T.***, 2006 WL 2644373, at *9 (citing ***Dep't of Children's Servs. v. T.S.W.***, No. M2001-01735-COA-R3-CV, 2002 WL 970434, at *3 (Tenn. Ct. App. M.S., filed May 10, 2002)). After reviewing the applicable factors in light of the facts discussed at length above, including Father's refusal to do what is necessary to regain custody of the child, as well as the child's current placement with foster parents who are equipped to deal with her special needs, we readily conclude that the evidence does not preponderate against the trial court's conclusion, made by clear and convincing evidence, that termination of Father's parental rights is in the child's best interest.

IV.

The judgment of the trial court is affirmed and this cause is remanded to that court for enforcement of its judgment and for collection of the costs assessed below, all pursuant to applicable law. Costs on appeal are assessed to the appellant, T.G.

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CHARLES D. SUSANO, JR., JUDGE